No. 13017.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMET THEATRE ENTERPRISES, INC.,

Appellant,

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON, CARTWRIGHT & WILSON CONSTRUCTION CO., a Copartnership, and CARTWRIGHT & WILSON CONSTRUCTION CO., a Corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellees' Reply Brief urges the sustaining of the trial court's judgment for two reasons, the first of which appears to be the Appellees' contention that the defendants were not contractors within the meaning of Sections 7026, 7028, 7030, 7031, 7055, and 7057 of the Business and Professions Code of California. The second contention advanced by the Appellees is based upon the authority of the cases of *Holm v. Bramwell,* 20 Cal. App. 2d 332, and *Meyers v. City of Calipatria,* 140 Cal. App. 295. It is respectfully submitted that both of Appellees' theories for support of this judgment are demonstrably erroneous and inapplicable, for the following reasons:

The Defendants Rendered Services as Contractors Within the Meaning of the Business and Professions Code of California.

The findings of fact signed by the trial court in part read as follows:

> "The defendants were employed by the plaintiff in connection with the construction of a drive-in theater in Pasadena, California, in connection with which said construction defendants supervised certain of the work, consulted with and furnished certain plans and specifications to plaintiff's architect, and arranged for two or more experienced sub-contractors to come to Pasadena from Utah to do various parts of the work."

Section 7057 of the California Business and Professions Code defines a building contractor as follows:

> "A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind requiring in its construction the use of more than two unrelated building trades or crafts or to do or superintend the whole or any part thereof."

Section 7026 of the Business and Professions Code defines a contractor as follows:

> "The term contractor for the purposes of this chapter is synonymous with the term 'builder' and, within the meaning of this chapter, a contractor is any per-

son, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, approve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor."

The trial court found specifically that the agreement between the plaintiff and the defendants was illegal by reason of the fact that the defendants were not licensed as building contractors. The record, we think, is abundantly clear, and the trial court so found, that the services rendered by the defendants were services which required them to have and hold a contractor's license. Appellant respectfully urges that no true question of law exists with reference to the requirement that the defendants be licensed. The only reasonable conclusion to be drawn from the findings of fact and conclusions of law signed by the trial court was that the defendant performed services for which they were required to have and hold a contractor's license. This, of course, they did not hold.

The true question on appeal is whether or not the plaintiff may recover a payment made to such unlicensed defendants.

The Holm and Meyers Cases Do Not Support the Judgment and Are Distinguishable From This Case.

The factual differences between the *Holm v. Bramwell* case and the case on appeal here point up sharply the exception to the general rule that a person cannot recover money paid to another under an illegal contract where both parties are equally guilty or in *pari delicto*. The test as to whether the parties are in *pari delicto* or not turns upon whether or not the statute which forbids the particular conduct was made for the protection of one of the parties. There is no question but that the plaintiff in the case now before this Court was one of the persons protected by the building contractors' licensing statutes. The plaintiff was not required to have a license, but the defendants were so required.

Factually, the case of *Holm v. Bramwell* differs from the case before this Court. The pertinent and distinguishing facts of the *Holm* case are, briefly, as follows: The plaintiff there was a licensed building contractor. The plaintiff secured the services of one Collins, who was to perform subcontracting work under the plaintiff. Collins, the subcontractor, was not licensed. In an action brought by the licensed contractor to foreclose a mechanic's lien against the owner of the property, the licensed contractor sought to include in the amount of his claim the money he voluntarily paid to the unlicensed subcontractor. This the Court did not allow him to do. The Court found that the contract between the licensed con-

tractor and the unlicensed subcontractor was illegal and void, because the subcontractor was unlicensed as required by the California contractors' license law.

In the *Holm* case, the action was by a licensed contractor against the owner of the property to foreclose a mechanic's lien. Unlike the case before this Court, no action was brought by anyone against the unlicensed contractor. In that case the unlicensed subcontractor was not even a party to the action. In short, the question of law presented in the *Holm* case was not that of a plaintiff seeking to recover money he paid to an unlicensed contractor but on the contrary, it was an action by a licensed contractor against the owner of property.

The *Holm* case supports the Appellant's position, since the Court in that case followed the general established rule that an agreement with an unlicensed contractor is wholly void.

As between a licensed contractor and an owner of property, the Court in the *Holm* case properly held that the licensed contractor could not recover for money he paid voluntarily to an unlicensed subcontractor. This was true because the conduct of the licensed contractor in attempting to charge the landowner with the amount of money paid to an unlicensed person would in effect circumvent the rule of law that the agreement between a party and an unlicensed person is wholly void. The Court properly reasoned that such payments made by the general contractor to the unlicensed subcontractor were in effect

money he had given away voluntarily, and as such he certainly could not charge the landowner therefor.

The holding in the *Holm v. Bramwell* case, relied upon by the Appellee, is entirely consistent with the position of the Appellant on this appeal. The absolute invalidity of the agreement for contracting services between a person and an unlicensed person is clearly enunciated by the Court in this case. It was not a case, however, where the person who was protected by the statute sought to recover money paid to an unlicensed contractor. That case is not controlling here and is not even close factually or in theory to the case on appeal here.

The case of *Meyers v. City of Calipatria,* cited by Appellees, is not comparable factually with the case on appeal here, nor are the legal questions therein involved present in the case on appeal here.

That case recognized the general rule that a person cannot recover money paid by him under an illegal contract where both parties are equally guilty or are in *pari delicto*. The plaintiff in the case on appeal has clearly brought himself within the recognized exception to this rule. The exception is that where a statute is aimed at protecting one of the parties to a transaction, such a party who is in the protected class is not in *pari delicto* as a matter of law with the other party to the transaction. Not only is this rule recognized in California as such, but, as was pointed out in Appellant's opening brief, is recognized throughout the country.

In the case on appeal before this Court, we think it is clear that the plaintiff was within the class of persons sought to be protected by the building contractors' license law. The purpose of the license law was to protect the public in their dealings with contractors whose qualifications had not been submitted to licensing tests and requirements. The defendant contractors in this case did not demonstrate that they had the necessary qualifications to act as contractors by securing the required license. It follows, therefore, as a matter of established law that the plaintiff and the defendants were not equally guilty, but that the plaintiff was in the protected class of persons contemplated by the licensing law.

Conclusion.

It is therefore respectfully submitted that judgment in this case should be reversed.

Respectfully submitted,

Maurice J. Hindin,
Attorney for Appellant.